**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

| | | |
|---|---|---|
| **JOHN UNTEREKER, JR.**<br>Claimant | ) | |
| VS. | ) | |
| **PRINT XCEL DOCUMENTS**<br>Respondent | ) | Docket No. 265,837 |
| AND | ) | |
| **PACIFIC EMPLOYERS INSURANCE CO.**<br>Insurance Carrier | ) | |

## ORDER

Claimant requested review of the January 18, 2005, Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Appeals Board (Board) heard oral argument on July 12, 2005.

### APPEARANCES

William L. Phalen, of Pittsburg, Kansas, appeared for the claimant. Michael T. Halloran of Overland Park, Kansas, appeared for respondent and its insurance carrier.

### RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

### ISSUES

The ALJ found that claimant refused respondent's offer of an accommodated job at a comparable wage. The ALJ concluded that claimant's refusal was not done in good faith and, therefore, imputed to claimant the wage he could have earned in the offered position. As the imputed wage was at least 90 percent of claimant's preinjury average weekly wage (AWW), the ALJ found that permanent partial disability was limited to

claimant's functional impairment. The ALJ considered the ratings of three physicians and found claimant's functional impairment to be 10% to the body as a whole.

The claimant argues the ALJ erred by denying claimant a work disability and finding the claimant had turned down an accommodated job. Claimant contends that the testimony of Dennis Stewart, respondent's general manager, was less than credible about whether an appropriate accommodated job was offered. Claimant also argues that even if a job was offered, the restrictions of the treating physician changed after claimant's termination and no accommodated position was offered after the change of restrictions.

Respondent and its insurance carrier (respondent) argue that claimant was offered an accommodated position within his medical restrictions at his pre-injury wage. Therefore, respondent and its insurance carrier request that the award of the ALJ be affirmed.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant is a college graduate with a degree in mathematics who had worked for respondent for three years. At the time of the accident, he was employed as a press operator. Claimant testified that on March 23, 2001, he was lifting a roll of paper at the end of a print run. He bent down, lifted it up and twisted the roll to stack it. As he did so, a pain shot from his back down into his right leg. Nevertheless, claimant continued working and finished his shift that day.

Claimant testified he had previously injured his back in 1998. As a result, Dr. Hish Majzoub performed an L5-S1 diskectomy on claimant's back in September 1998. Claimant testified his symptoms went away after the surgery, and he was released to return to work with no restrictions.

After his work-related accident of March 2001, claimant was sent to Dr. Adam Paoni, who gave him some pain pills and told him to come back in a week if he was still in pain. Claimant was then sent to Dr. Majzoub, who ordered an MRI, which showed a large herniated disk at L5-S1. Dr. Majzoub performed a repeat lumbar laminectomy of L5-S1 and microdiscectomy on claimant. On June 11, 2001, claimant was released to return to work with restrictions of a maximum of 30 pounds lifting and no repetitive bending or stooping. After receiving these restrictions, six weeks passed before respondent contacted claimant about returning to work.

Because of his restrictions, claimant was unable to return to work as a press operator. Upon his return to work at respondent in July 2001, he was given a job as

assistant to the supervisors. He did this job for two to three months, when respondent removed him from that position and gave him the position of purchasing manager, where he ordered supplies for the production area. Claimant continued at that job for several months. Then, about six to eight weeks before he was terminated, claimant was given a job as a supply clerk and worked at that job until terminated. Claimant said this job exceeded the restrictions placed on him by Dr. Majzoub. When he complained to his supervisor about the job exceeding his restrictions, he was told: "Just do it."[1] In August 2002, claimant was told respondent did not want to work around his restrictions any longer, and he was laid off.

Claimant returned to Dr. Majzoub for a check-up in December 2002, at which time Dr. Majzoub recommended claimant seek vocational rehabilitation retraining for a desk job.

Claimant testified that after he was laid off, he began looking for work at a rate of five to ten businesses a week. He currently works at National Pizza Company International (NPI) as a technical writer making $8.50 per hour. He stated he still continues to look for a job making a higher wage.

Claimant claims he continues to have constant pain which causes spasms and tightness. He is not as flexible as he used to be. His symptoms are worse during prolonged sitting. Claimant testified that currently his pain is in his low back and not his right leg, although he sometimes feels a sensation in his leg. He takes Ibuprofen for pain.

Claimant agrees that the job he was given after returning to work for respondent after his accident, ordering stock and supplies, was within his work restrictions. Claimant was removed from that job because respondent was dissatisfied with his performance. Claimant's current job with NPI is classified as a sedentary job and is within his limitations.

Dennis Stewart became the general manager of respondent in October 2001. He was not general manager when claimant suffered his injury on March 23, 2001. Claimant was still off work when Mr. Stewart started at respondent. After claimant was released to return to work, a position was specially created for him as an assistant to supervisors. It was Mr. Stewart's recollection that claimant was removed from this position because of performance problems. Mr. Stewart would not have documented the performance problems as that would have been up to the supervisor. Mr. Stewart testified that claimant had a tendency to wander off and get lost for 15 to 30 minutes at a time, that claimant took excessive and lengthy smoke breaks and had low motivation.

Claimant was next given a position in purchasing but also did not perform well in that position. Mr. Stewart testified that claimant was removed from the purchasing position because he was unorganized, lowly motivated and had a poor work ethic. Claimant was

---

[1]Regular Hearing Trans. at 21.

then moved to the supply cage. Mr. Stewart testified that he discussed the job tasks with claimant and advised claimant that he would have appropriate help to be able to handle the job within his restrictions. Mr. Stewart said that claimant was allowed the flexibility of organizing the supply room to accommodate his needs. After claimant worked in this area just a short time, from several days to possibly a month, claimant indicated to Mr. Stewart that the job was too physically demanding for him.

Claimant was then offered a scheduling position for the same amount of wages. The position description for the scheduling job noted the employee must occasionally lift and/or move up to 25 pounds. However, Mr. Stewart testified that respondent was able to make accommodations for this task. Claimant accepted this position, but after a day claimant went to the plant manager and said he could not emotionally handle the pressures of the position. Stewart testified that at that point, respondent had exhausted every position that could accommodate claimant's restrictions.

The Kansas appellate courts have interpreted K.S.A. 44-510e(a) to require workers to make a good faith effort to continue their employment post injury. The court has held a worker who is capable of performing accommodated work should advise the employer of his or her medical restrictions and should afford the employer a reasonable opportunity to adjust the job duties to accommodate those restrictions. Failure to do so is evidence of a lack of good faith.[2] Additionally, permanent partial general disability benefits are limited to the functional impairment rating when the worker refuses to attempt or voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.[3]

In *Foulk*[4], the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability by refusing an accommodated job that paid a comparable wage. Employers are encouraged to accommodate an injured worker's medical restrictions. In so doing, employers must also act in good faith.[5] In providing

---

[2] *See, e.g., Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999), and *Lowmaster v. Modine Mfg. Co.*, 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* 265 Kan. 885 (1998).

[3] *Cooper v. Mid-America Dairymen*, 25 Kan. App. 2d 78, 957 P.2d 1120, *rev. denied* 265 Kan. 884 (1988).

[4] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[5] *Niesz v. Bill's Dollar Stores*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not genuine[6] or not within the worker's medical restrictions.[7]

The permanent partial general bodily disability, or what is also known as "work disability" is defined at K.S.A. 44-510e(a) and provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A.44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.** (Emphasis added.)

It is well settled that an injured employee must make a good faith effort to return to work within his or her capabilities in order to be entitled to work disability under K.S.A. 44-510e(a).[8] If an injured employee fails to make a good faith effort to find appropriate employment, a wage may be imputed based upon the employee's capacity to earn wages.[9] In order to determine if the employee is still capable of earning nearly the same wage, the factfinder must first determine if the employee made a good faith effort to find appropriate employment.[10]

In the Award, the ALJ concluded:

> In the present case, the claimant did not attempt the scheduler job for any meaningful period of time, and articulated no reason for declining the job. The hearsay statement that the claimant could not emotionally handle the job is a conclusion based on no reasons. The claimant is college degreed and had three years work experience with the respondent. The claimant appeared to meet all of the qualifications and physical abilities listed on the scheduler/planner job

---

[6] *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[7] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[8] *Oliver v. Boeing Co.,* 26 Kan. App. 2d 74, 76-77, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[9] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997).

[10] *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, Syl. ¶ 1, 9 P.3d 591 (2000).

> description, and there was nothing listed in the job responsibilities that would indicate the job is emotionally taxing.
>
> The facts in this case do not prove the claimant exhibited good faith in obtaining post-injury employment. The claimant refused an offered, comparable wage, accommodated job within the claimant's abilities, and there is no reason to except the claimant's refusal from the *Foulk* rationale. The comparable wage the claimant could have earned in the scheduler/planner position is imputed to the claimant, and therefore K.S.A. 44-510e general disability is precluded. Permanent partial disability in this case shall be limited to functional impairment.[11]

The Board agrees with the ALJ's analysis and affirms his conclusion that claimant's permanent partial disability award should be limited to the percentage of functional impairment.

In awarding claimant 10 percent functional impairment, the ALJ noted the ratings given by three physicians, all of whom diagnosed claimant with recurrent lumbosacral disk herniation at L5-S1 and calculated their ratings using the AMA *Guides*[12]. Dr. Majzoub, the treating physician, testified that claimant had an 8 percent functional impairment over and above an 8 percent rating for his 1998 back injury. Dr. Edward Prostic opined that claimant had a 12 percent rating. Although he did not specifically testify whether his rating included any impairment for claimant's prior surgery, he did state: "My opinion continues to be that [claimant] sustained 12 percent permanent partial impairment of the body as a whole from that [March 23, 2001] accident."[13] Dr. Vito Carabetta's report indicated claimant had a 2 percent functional rating from the March 2001 accident. However, during cross-examination, Dr. Carabetta admitted that, depending on how one interpreted the AMA *Guides*, claimant's functional impairment from the March 2001 accident could be 10 percent. The Board affirms the ALJ's finding that claimant suffered an additional 10 percent permanent impairment of function.

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated January 18, 2005, is affirmed.

**IT IS SO ORDERED.**

---

[11]ALJ Award (Jan. 18, 2005) at 4-5.

[12]American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[13]Prostic Depo. at 14.

Dated this _____ day of November, 2005.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Michael T. Halloran, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director